

SEP 28 1993

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 76.51(a) of
the Commission's Rules to Add
Kenosha and Racine as Designated
Communities in the Milwaukee,
Wisconsin, Television Market

)
)
)
)
)
)
)

MM Docket No.

To: Chief, Mass Media Bureau

PETITION FOR EXPEDITED RULEMAKING

LESEA BROADCASTING CORPORATION

John E. Fiorini, III
Francis E. Fletcher, Jr.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East Tower
Washington, D.C. 20005

Its Attorneys

September 28, 1993

No. of Copies rec'd
List A B C D E

044

MMB

RECEIVED

SEP 28 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51(a) of)
the Commission's Rules to Add)
Kenosha and Racine as Designated) MM Docket No.
Communities in the Milwaukee,)
Wisconsin, Television Market)

To: Chief, Mass Media Bureau

PETITION FOR EXPEDITED RULEMAKING

LeSEA Broadcasting Corporation ("Petitioner"), licensee of television broadcast station WHKE, Channel 55, Kenosha, Wisconsin, pursuant to Section 1.401 of the Commission's Rules, hereby petitions for amendment of Section 76.51(a) of the Commission's Rules to redesignate television market number 23, presently designated as "Milwaukee, Wisconsin", as "Milwaukee - Kenosha - Racine, Wisconsin." Petitioner further requests the Commission to consider this petition under the expedited procedures adopted in its recent Report and Order in MM Docket No. 92-259.^{1/}

^{1/} Implementation of the Cable Television Consumer Protection and Competition Act of 1992, FCC 93-144, 8 FCC Rcd. (released March 29, 1993) ("Must-Carry Order"). At paragraph 50, the Must-Carry Order provides for issuance of a notice of proposed rulemaking without first seeking public comment on requests such as Petitioner's. Further, Section 76.51, as amended by the Must-Carry Order, includes a Note providing, in part, that petitions for rulemaking "shall not be subject to the public notice provisions of Section 1.403 of this chapter."

I. INTRODUCTION AND BACKGROUND

Milwaukee, Racine and Kenosha are situated in close proximity along the western shore of Lake Michigan in the southeastern corner of Wisconsin. Racine is some 24 miles south of Milwaukee, and Kenosha is approximately 10 miles south of Racine. Each city is a major population center in its own right, each meriting separate status as a Metropolitan Statistical Area (MSA) as designated by the U.S. Office of Management and Budget.^{2/} Together, the three cities form a continuous and closely related population belt running along the lake front south from Milwaukee to the Illinois border. Both Kenosha and Racine are included by Arbitron in the Milwaukee Survey Area and Milwaukee Area of Dominant Influence (ADI). There is significant overlap of coverage areas among Petitioner's station (WHKE, Channel 55, Kenosha), Station WJJA, Channel 49, Racine, and the seven television stations which are licensed to Milwaukee.^{3/}

Although Station WHKE is entitled to carriage on Milwaukee and Racine-area cable systems under the rules adopted in the

^{2/} Under current standards adopted in January 1980, each MSA must include at least: (a) one city with 50,000 or more inhabitants, or (b) a Census Bureau-defined urbanized area of at least 50,000 inhabitants and a total MSA population of at least 100,000. Statistical Abstract of the United States 1992, 112th Edition, U.S. Department of Commerce, Bureau of the Census, Appendix II, p. 896.

^{3/} The seven television stations licensed to Milwaukee are: WTMJ-TV, Channel 4; WITI-TV, Channel 6; WISN-TV, Channel 12; WVTM, Channel 18; WCGV-TV, Channel 24; WVCY-TV, Channel 30; and WDJT-TV, Channel 58.

Must-Carry Order, such carriage would engender copyright license liability for the cable operators. This is because Section 111 of the Copyright Act, 17 U.S.C. § 111(f), continues to define "local" and "distant" television station signals pursuant to the Commission's old must-carry rules which preceded those adopted in the Must-Carry Order. For purposes relevant to Petitioner's request, the prior must-carry rules include classification of a signal as "local" where the television station's city of license has "designated community" status in the Commission's Top 100 Market List under Section 76.51 of the Rules. Accordingly, redesignation of the Milwaukee market as "Milwaukee - Kenosha - Racine" under Section 76.51 as proposed in this Petition, will permit Milwaukee and Racine-area cable systems to carry WHKE on an equal basis with other television stations in the market without incurring "distant signal" copyright liability.

II. PETITIONER'S PROPOSAL MEETS THE "COMMONALITY" REQUIREMENT ESTABLISHED UNDER THE MUST-CARRY ORDER

The Commission recognized in its Must-Carry Order that its Section 76.51 Top 100 Market List was out of date, having been derived largely from Arbitron's 1970 prime time household rankings. Indeed, the Commission acknowledged that Section 614(f) of the Cable Act of 1992 requires the Commission to make revisions needed to update the list and the designated market communities included in the list.^{4/} The Commission further

^{4/} Must-Carry Order, para. 48.

recognized that since Congress had specifically directed the Commission to use current ADI markets for determining must-carry rights, the required updating of Section 76.51 list would primarily affect copyright liability.^{5/} The Commission decided, however, that the record was insufficient in the Must-Carry Proceeding (MM Docket No. 92-259) to make wholesale revisions to Section 76.51, concluding that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted.^{6/} The Commission stated that it would expect such parties to provide evidence that "demonstrates commonality between the proposed community to be added to a market designation and the market as a whole."^{7/}

There is strong evidence of commonality among Kenosha, Racine and the Milwaukee market as a whole. The three cities are center points for three immediately adjacent MSAs which together encompass a continuous, closely located, and densely populated

^{5/} Id.

^{6/} The Commission made only three modifications to the Section 76.51 list in its Must-Carry Order pursuant to such individual requests: renaming the Columbus, Ohio market to include Chillicothe; adding New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut, market; and changing the Atlanta, Georgia, market to Atlanta-Rome. Must-Carry Order, para. 50.

^{7/} Id.

corridor in the southwest corner of Wisconsin which abuts the Chicago, Illinois, MSA to the south.^{8/}

The commonality between Kenosha, Racine and Milwaukee is also reflected in Arbitron's treatment of the Milwaukee market. Thus, Arbitron includes Kenosha and Racine not only within the larger Survey Area, but also within the Milwaukee ADI. Indeed, Arbitron identifies the ADI as "Milwaukee (Kenosha & Racine)".^{2/} The ADI, a standard market definition consisting of all counties in which the home market stations receive a preponderance of viewing, reflects Arbitron's view that Kenosha and Station WHKE are part of the Milwaukee market. The ADI establishes that, for economic purposes, WHKE participates in a common television market with the stations licensed to Racine and Milwaukee.

^{8/} The Milwaukee, Racine, Kenosha and Chicago MSAs are actually designated as Primary Metropolitan Statistical Areas ("PMSAs"). Under current standards adopted in 1980, within metropolitan complexes of one million or more population, separate component areas meeting certain criteria are defined and designated as PMSAs, and any area containing PMSAs is designated a Consolidated Metropolitan Statistical Area ("CMSA"). 1990 U.S. Census population figures for the Milwaukee, Racine and Kenosha PMSAs are: Milwaukee, 1,432,000; Racine, 175,000; and Kenosha, 128,000. The Milwaukee and Racine PMSAs are included within the Milwaukee-Racine, WI CMSA. The Kenosha PMSA is included within the Chicago-Gary-Lake County (IL), IL-IN-WI CMSA. Statistical Abstract of the United States 1992, 112th Edition, U.S. Department of Commerce, Bureau of the Census, Appendix II.

^{2/} Broadcasting & Cable Yearbook, Arbitron ADI Market Atlas, p. C-187.

III. PETITIONER'S PROPOSAL MEETS THE TRADITIONAL TEST FOR A HYPHENATED TELEVISION MARKET

The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market, including competing stations licensed to different cities within that market area.^{10/} The Milwaukee market consists of three major population centers: Milwaukee, Racine and Kenosha. Thus, a Milwaukee - Kenosha - Racine hyphenation would meet the first prong of the Commission's traditional definition of a hyphenated market. The second prong of the definition is also met. The fact that the three major population centers support all stations in the market is reflected in Arbitron's inclusion of Racine and Kenosha, and the television stations licensed thereto, within the Milwaukee ADI. Furthermore, the Grade B coverage contours of the Kenosha and Racine stations include substantial areas overlapped by the Grade B contours of the Milwaukee stations, and show clearly that all three population centers support all nine stations -- to wit, all nine Grade B contours reach all three cities. (See Exhibit A).

The Commission also has stated that the "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.^{11/}

^{10/} Cable Television Report and Order, 36 FCC 2d 143, 176 (1972).

^{11/} CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974).

This definition is met as well. The Kenosha station (WHKE), the Racine station (WJJA), and the stations licensed to the presently designated Section 76.51 city of Milwaukee, have coverage areas that substantially overlap; and, all of these stations do, in fact, compete for audiences throughout the market area. WHKE relies on the entire area served by its Grade B contour for economic support. There can be little doubt that WHKE is unavoidably competing with the other stations in the Milwaukee - Kenosha - Racine market.

The Commission traditionally has looked to four factors in evaluating individual market conditions consistent with the underlying competitive purpose of the market hyphenation rule: (1) the distance between the proposed community and the existing designated community; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the change.^{12/}

All four factors are supportive of the proposed redesignation of the Milwaukee market. First, the tri-cities are proximate -- Racine is 24 miles south of Milwaukee and Kenosha is 10 miles south of Racine, and the Milwaukee, Racine and Kenosha MSAs are contiguous. By contrast, the redesignation of the

^{12/} See, e.g., Major Television Markets (Fresno-Visalia, Calif., 57 RR 2d 1122 (1985)).

Atlanta market as Atlanta-Rome, as approved in the Must-Carry Order, involved communities that are some 56 miles apart.^{13/}

The second factor, whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area, would no longer seem to have relevance given that the new must carry rules adopted by the Commission in the Must-Carry Order are keyed to the ADI rather than the Grade B contour looked to under the old must-carry rules. Nonetheless, the proposed modification of Section 76.51 substantially complies with this criterion as well since the majority of Milwaukee-area cable systems which would be affected by the rule change are within the Grade B contours of the Racine or Kenosha stations.

With respect to the third factor, a particularized need for the proposed rule change exists. Station WHKE already has been notified by several Milwaukee-area cable systems that they will not carry the station because of copyright liability. The need for the proposed amendment to Section 76.51 is thus not theoretical, but real and immediate. Finally, the public will benefit from the proposed redesignation because it will bring to the cable systems in the Milwaukee-area diversified programming from an independent UHF television station.

^{13/} It should be noted that the distance between Rome and Atlanta was not ameliorated by co-location of transmitters, a factor sometimes considered by the Commission in addressing the proximity factor. See, Request of TV 14, Inc. to Amend Section 76.51 of the Commission's Rules, 7 FCC Rcd 8591, 8592 (1992).


III. CONCLUSION

Petitioner's proposed redesignation of the Milwaukee market is consistent with the rationale of the Must-Carry Order, meets the "commonality" standard described therein, and would address the anomalous circumstances created by the treatment of Station WHKE as a "local signal" under the new must-carry rules and as a "distant signal" for copyright liability purposes with respect to Milwaukee-area cable systems. In addition, the requested redesignation meets the standards traditionally applied by the Commission in creating hyphenated markets under Section 76.51 of its Rules. Accordingly, it is requested that the Commission issue a notice of proposed rulemaking to amend Section 76.51 of the Rules to redesignate the Milwaukee market as "Milwaukee - Kenosha - Racine", in accordance with the expedited rulemaking procedures established in the Must-Carry Order.

Respectfully submitted,

LESEA BROADCASTING CORPORATION

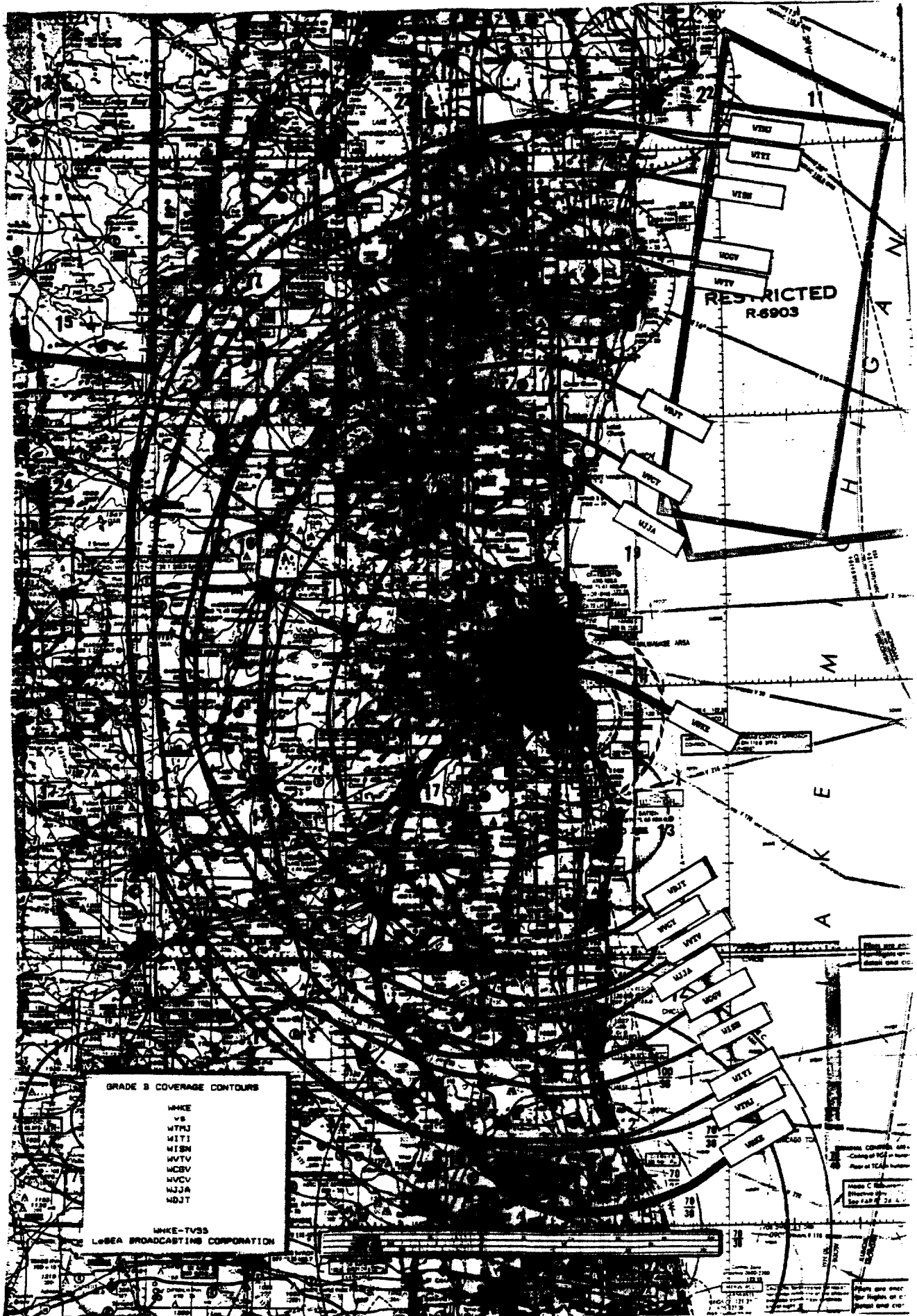
By:


John E. Fiorini, III
Francis E. Fletcher, Jr.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East Tower
Washington, D.C. 20005

September 28, 1993

Its Attorneys

65831-003\53927

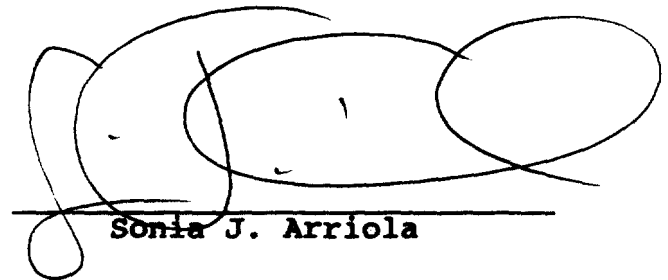


CERTIFICATE OF SERVICE

I, Sonia J. Arriola, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 28th day of September, 1993, caused to be sent by hand delivery, a copy of the foregoing PETITION FOR EXPEDITED RULEMAKING to the following:

Mr. Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Alan Aronowitz
Federal Communications Commission
2025 M Street, N.W., Room 8002
Washington, D.C. 20554



Sonia J. Arriola